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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re AMAYA M., a Person Coming Under  
the Juvenile Court Law.**

**CONTRA COSTA COUNTY CHILDREN  
& FAMILY SERVICES BUREAU,**

**Plaintiff and Respondent,**

**v.**

**SERGIO M.,**

**Defendant and Appellant.**

**A124398**

**(Contra Costa County  
Super. Ct. No. J07-00213)**

Sergio M. (Father) appeals an order terminating his parental rights over his daughter Amaya M., born in April 2002. (Welf. & Inst. Code, § 366.26.)<sup>1</sup> Father contends the juvenile court erred in refusing his request for a continuance of the parental termination hearing and failed to apply the continuing beneficial relationship exception to parental termination. (§ 366.26, subd. (c)(1)(B)(i).)<sup>2</sup> We reject the contentions and affirm.

<sup>1</sup> All undesignated section references are to the Welfare and Institutions Code.

<sup>2</sup> Mother's parental rights over Amaya were also terminated, however, she is not a party to this appeal. Mother and Father are collectively referred to as "Parents."

## BACKGROUND

On May 21, 2007, the Contra Costa County Children & Family Services Bureau (Bureau) filed the original juvenile dependency petition regarding Amaya. Pursuant to section 300, subdivision (b) (failure to protect), the petition alleged that on approximately April 18, police found drugs and paraphernalia in Mother's home. Mother pled no contest to the allegations of the petition.

The Bureau's investigation narrative noted that Father said he and Mother were divorced and he was suspicious of Mother's boyfriend's drug use, but was unaware of Mother's drug use. The Bureau discovered that Father had been arrested for being under the influence of a controlled substance. Father said he was currently involved in a drug treatment program and employed full time and wanted Amaya placed with his parents, since he was unable to take care of her. He said he and Amaya were "well bonded" and he visited her every other week.

### *Disposition Report*

The Bureau's September 2007 disposition report noted several prior referrals between 1996 and 2001. In 2001, Amaya's older half-sister A.R. and older half-brother Alexzander M. were removed from Parents' home and dependency petitions were filed after Parents were arrested for selling methamphetamine. In a 2003 dependency case regarding Amaya, Father was found to have an extensive history of substance abuse which he had been unable to adequately address. Parents' parental rights over Alexzander were terminated in 2003, and a legal guardian was appointed for A.R. In 2005, Amaya's 2003 dependency case was vacated and dismissed, with sole custody granted to Mother and supervised visitation granted to Father.

Father had an extensive criminal history between 1996 and 2004, including convictions for driving under the influence, possession of a controlled substance, possession of a dangerous weapon, and possession of a controlled substance for sale. He was incarcerated from August 2002 to April 2003. In 2004, while on probation, he was arrested for possession of methamphetamine for sale and jailed. At the time of the report, he was placed in an outpatient substance abuse program and was scheduled to complete it

in a year. The report recommended that Father be randomly drug tested more frequently than once or twice a month, given his drug history. It also recommended that Father enroll in parenting and counseling services.

As of August 2007, Father was employed and visiting with Amaya when he was able. He said that although he was unable to provide for her care, he wanted to participate in reunification services. Amaya said she did not want to live with Father because she would miss Mother too much.

Amaya's development was age appropriate. In May 2007, she was placed in the same foster home as A.R. and adjusting well. She started individual counseling in August 2007. Father was having unsupervised visits with Amaya. On two occasions, she urinated in her pants while visiting with him. During visits, Father was interactive with Amaya and she enjoyed the visits with him.

The report recommended reunification services for Parents. At the September 2007 dispositional hearing, the court ordered family reunification services for Parents. Parents were granted twice monthly hour-long visits with Amaya. Father was ordered to drug test on demand.

#### *Six-Month Review*

The Bureau's March 2008 six-month status review report recommended continuation of reunification services for Parents and Amaya's continued out of home placement. Father was continuing in his outpatient substance abuse program. His attendance was good and his drug tests were negative. However, even after drug testing was scheduled so as not to conflict with Father's full-time work schedule, he missed a test. Although he stated a willingness to enroll in parenting classes and counseling, he said his work schedule might prevent him from following through. At the March six-month review hearing, reunification services were continued and parental overnight visits lasting up to three days were approved.

#### *12-Month Review*

The Bureau's July 2008 12-month status review report recommended termination of reunification services for Parents and setting the matter for a section 366.26 hearing

(hereafter .26 hearing). The report stated that Father was minimally participating in his case plan. Although he completed his outpatient substance abuse treatment program in April, he did not follow through on referrals for parenting classes and counseling. However, he had begun the intake for counseling at the end of June. His compliance with drug testing increased and all tests were negative. Father's sentencing hearing on federal drug charges was set for late July and Father indicated a possibility he would be returned to prison.

Amaya was moved to a new foster placement in June 2008 and the transition was somewhat difficult. Twice monthly unsupervised visits with Parents were going well.

At the July 2008 12-month hearing, the court terminated reunification services for Parents, changed their telephone calls with Amaya to once per week, changed Father's supervised visitation to once per quarter if Father was within 50 miles of Amaya's residence, and set the matter for a contested review hearing on August 15.

An August 12, 2008 Bureau update memorandum to the court stated that Father had attended only four individual therapy sessions and three of 20 parenting education classes. In July, he had been sentenced to two or three years in federal prison and was scheduled to turn himself in to authorities in September. Amaya's therapist stated that Amaya had a stronger connection with Mother than with Father. The therapist opined that Amaya's need for permanency and stability outweighed waiting for Father to "get it together." The Bureau was to arrange a meeting between Father and Amaya's caregivers to discuss a plan for contact and visitation while he is in prison. Father did not call to schedule an overnight visit with Amaya until June 9, almost two months after such visits were authorized by the court. Father had only one supervised visit with Amaya since the last court hearing.

At the August 15, 2008 contested 12-month hearing, Father's counsel clarified that Father was sentenced to a three-year federal prison term and would turn himself in by September 10. Counsel requested setting the .26 hearing for a guardianship to enable Father to reunify with Amaya upon his release from prison. At the hearing, the court terminated reunification services for Parents and set the matter for a .26 hearing on

December 19. It allowed one more visit to Father before he surrendered to federal authorities, and, while incarcerated, granted him one hour supervised visits every three months if he was incarcerated within 50 miles of Amaya's foster placement. It also permitted Father to send "guilt-free" cards or letters to be reviewed by the Bureau and limited him to one monitored phone call per week.

In October 2008, Division Three of this court summarily denied Father's petition for an extraordinary writ. (Cal. Rules of Court, rule 8.452.)

Prior to the .26 hearing, Father sent a letter to the juvenile court requesting a change of counsel. The court held a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) on December 19, 2008, while Father was incarcerated and not present. Father's counsel said she had just learned that Father was incarcerated at the federal prison in Lompoc (Lompoc) and needed time to prepare the request for Father to be transferred to the .26 hearing to contest the plan of adoption for Amaya. The court denied Father's request for change of counsel and rescheduled the .26 hearing to January 30, 2009, in order for Father to be removed from Lompoc and transported to the .26 hearing.

#### *.26 Hearing Report*

The Bureau's December 2008 .26 hearing report stated that Amaya was placed in the home of nonrelated extended family members in Martinez. Father's last visit with her was on October 13. He is incarcerated in Lompoc, more than 50 miles from Amaya's residence. He calls Amaya weekly and sends her cards and letters through the Bureau. Amaya's caregiver said Amaya does not want to visit with her paternal grandparents. The report stated that Amaya is adoptable and her current caregivers are committed to her long-term care and Amaya's adoption. The Bureau recommended that any future visitation between Amaya and Parents be at the discretion of the prospective adoptive parents. The current caregivers are committed to maintaining contact between Amaya and Parents if it continues to remain positive for Amaya. Although Father opposed Amaya's adoption, he was unable to show that he was able to provide a safe and stable environment for her.

A January 22, 2009 update by the Bureau stated that on January 5, the adoptions social worker sent Father a letter requesting that he telephone Amaya only on his scheduled day and time. Reports had indicated he was telephoning Amaya's foster home multiple times daily or weekly.

### *.26 Hearing*

At the outset of the January 30, 2009 .26 hearing, Father's counsel requested another continuance to obtain Father's transfer from federal custody to attend the .26 hearing. Although the court had signed an order for Father's removal on December 22, 2008, it stated that in its 15 years on the juvenile court it had never been successful in removing someone from federal prison. The Bureau's counsel stated that in her experience, the Bureau had never been successful in removing someone from federal prison. The court noted that the file contained a memorandum from the Contra Costa County Sheriff's Office to Lompoc stating it had an order for Father to appear in a child custody hearing and the sheriff's office would appear at Lompoc to pick him up. A handwritten notation on the bottom of the memorandum states: "Federal Inmates are not released for child custody hearings." The court impliedly denied the request for continuance and proceeded with the .26 hearing.

Counsel for Mother and Amaya expressed support for termination of parental rights as being in Amaya's best interest. Father's counsel argued that Father feels that his bond with Amaya outweighs any benefit to Amaya from adoption. Father's counsel submitted photographs, cards and artwork Amaya had made for Father over the years.

Bureau social worker Victoria King testified that Father missed scheduled telephone calls with Amaya on January 11 and 18, 2009, but did talk to Amaya on January 26. Amaya did not ask to call Father after his two missed calls. King said that Father was scheduled to be released from prison in about two years. She also said that Amaya refers to her foster parents as "Mom" and "Dad," and they want to adopt her. On December 16, Amaya told another Bureau social worker that she did not want to visit her paternal grandparents and wanted to stay in her current placement with her foster parents.

The paternal grandparents requested that Amaya remain in foster care for another 18 months, until Father's expected release from prison on good behavior.

The court found by clear and convincing evidence that termination of parental rights was in Amaya's best interest and that her return to Parents' custody would be detrimental. It found that Amaya's need for a permanent home outweighed an indefinite postponement of her permanency in order for Father to possibly renew contact with her in the future. After finding Amaya likely to be adopted, the court terminated Parents' parental rights over her.

## DISCUSSION

### I. *The Denial of Continuance of the .26 Hearing Was Not an Abuse of Discretion*

Father contends the court erred in denying his request for a continuance of the .26 hearing to enable him to appear at that hearing. In particular, he argues the court abused its discretion in relying on the unsigned handwritten notation on the Sheriff's Office memorandum.<sup>3</sup> Father asserts that the denial of his right to be present at the .26 hearing violated his rights to due process and constitutes structural error requiring reversal or a finding that the .26 hearing order is void.

The case of *In re Maria S.* (1997) 60 Cal.App.4th 1309 (*Maria S.*) is instructive. In that case, the father was incarcerated in a federal detention center, awaiting deportation, at the time of the section 366.22 hearing. The social worker's report stated that the Immigration and Naturalization Service would not transport the father to the hearing. (*Maria S.*, at pp. 1311-1312.) The hearing proceeded without the father's appearance, and he was represented by counsel at all the dependency hearings. (*Id.* at p. 1311.) On appeal, the father argued that he was deprived of his right to effectively participate in the dependency proceedings. (*Id.* at p. 1312.)

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<sup>3</sup> Father's failure to cite any legal authority in support of his assertion that the court erroneously relied on the handwritten notation on the memorandum constitutes a waiver of the assertion. (Cal. Rules of Court, rule 8.204(a)(1)(B); *Dabney v. Dabney* (2002) 104 Cal.App.4th 379, 384 [court need not consider argument for which no legal authority cited].)

*Maria S.* stated: “Penal Code section 2625 establishes a procedure through which *state* prisoners incarcerated in California are able to attend dependency hearings held in California.<sup>[4]</sup> There is no statutory equivalent establishing a procedure to facilitate the attendance of out-of-state or *federal* prisoners. However, the absence of such an equivalent does not require the juvenile court to suspend dependency proceedings pending [a parent’s] release from federal custody. Nor is the juvenile court deprived of its jurisdiction to proceed.” (*Maria S.*, *supra*, 60 Cal.App.4th at p. 1312, italics added.)

Quoting *In re Gary U.* (1982) 136 Cal.App.3d 494, 497, 498-499, *Maria S.* stated: “ ‘[A] felon incarcerated in a jurisdiction other than California is not denied equal protection of the law where the State of California has statutorily provided a means by which inmates confined within its own penal system may [e]nsure their physical presence at any judicial proceeding designed to sever their parental rights, without establishing a similar mechanism for those confined by other states. [Fn. omitted.]’ [Citation.] . . . ‘California has not denied [Gary], or any out-of-state prisoner, the right to be present. What it has done is to devise a scheme by which all state prisoners whose custody is under its direct control may physically appear if they wish. [Fn. omitted.] The Legislature contemplated the scheme would trigger on a simple court order directed to the warden of the state prison involved. This device can only be assured of success in California where the custodian is subject to the mandate of section 2625 and the jurisdiction of the requesting court. [Gary] does not argue there is any power in the California Superior Court to issue an enforceable order to an out-of-state security facility, nor that the Arizona prison warden had any duty, or authority, to respond to the California court order lodged in this case. Further, he suggests no feasible, alternative method to ever [e]nsure his physical appearance at a California hearing.’ [Citation.]” (*Maria S.*, *supra*, 60 Cal.App.4th at p. 1313.) *Maria S.* noted that after a child has been

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<sup>4</sup> Penal Code section 2625 provides that for purposes of that section “ ‘prisoner’ ” includes any person in state prison custody, the California Rehabilitation Center, a county jail, or a ward of the Division of Juvenile Facilities. (Pen. Code, § 2625, subd. (a).)



removed from the parent's home for a substantial time due to parental abuse or neglect and the parent has failed to correct the problems which led to the removal, the balance between the parent's and the child's rights shifts. (*Id.* at pp. 1313-1314.) It concluded that the minor's need for stability outweighed any interest in awaiting her father's release from federal custody or Congress's change of federal incarceration procedures. (*Id.* at p. 1313.)

In *In re Jesusa V.* (2004) 32 Cal.4th 588, 626, our Supreme Court cited *Maria S.* for the proposition that there is no due process violation when a parent incarcerated in an out-of-state or federal prison is unable to attend a dependency hearing and is instead represented by counsel. (*In re Jesusa V.*, at p. 602.)

In this case, no constitutional error is demonstrated. Father was represented by counsel at the .26 hearing.<sup>5</sup> His counsel cross-examined the Bureau social worker and the court acceded to counsel's request that the paternal grandparents be allowed to address the court to speak on Father's behalf. In addition, the court permitted counsel to submit a "large stack" of photos of Father with Amaya and artwork that Amaya had made for Father over the years. Significantly, Father does not suggest any testimony or evidence he would have presented had he appeared at the .26 hearing.

The record before us demonstrates that the court made every effort to have Father removed from federal prison so that he could appear at the .26 hearing, but was without authority to do so. In light of Father's representation by counsel at the .26 hearing, there was no abuse of discretion in the court's decision that it was in Amaya's best interest to deny his request for a continuance and proceed with the .26 hearing.

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<sup>5</sup> For the first time in his reply brief, Father argues that prior to the .26 hearing the court denied his *Marsden* motion without his court attendance and, therefore, he was represented at the .26 hearing by an attorney who was not adequately representing his interests. We decline to address this argument because it was raised for the first time in Father's reply brief. (*Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3.)

## II. *The Continuing Beneficial Relationship Exception Does Not Apply*

Father also contends the continuing beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i))<sup>6</sup> applies to prevent termination of his parental rights over Amaya.

At a .26 hearing, where possible, adoption is the permanent plan preferred by the Legislature. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.) Where the court finds a minor cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds that termination of parental rights would be detrimental to the minor under one of six enumerated exceptions. (§ 366.26, subd. (c)(1)(B); see *In re L. Y. L.*, at p. 947.) It is the parent's burden to establish the existence of one of the exceptions to termination. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 731.)

In *In re Autumn H.* (1994) 27 Cal.App.4th 567, the court interpreted the beneficial relationship exception to mean “the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.” (*Id.* at p. 575.) The child's age, the portion of the child's life spent in the parent's custody, the effect of the interaction between the parent and child, and the child's particular needs, are factors which may be considered by

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<sup>6</sup> Section 366.26 provides that if the juvenile court finds the child adoptable, “(c)(1) . . . the court shall terminate parental rights and order the child placed for adoption . . . unless . . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: . . . [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

the court in considering the applicability of the beneficial relationship exception. (*Id.* at pp. 575-576.)

Although the beneficial relationship exception does not require proof that the minor has a “ ‘primary attachment’ ” to the noncustodial parent or that the noncustodial parent has maintained day-to-day contact with the minor (*In re S.B.* (2008) 164 Cal.App.4th 289, 300), “the relationship must be such that the child would suffer detriment from its termination. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

A trial court’s determination regarding the beneficial relationship exception is affirmed if supported by substantial evidence. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 297; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) We review the evidence in the light most favorable to the prevailing party and indulge in all legitimate and reasonable inferences to uphold the court’s ruling. (*In re S.B.*, at p. 297.)

Father relies on *In re S.B.*, a case in which the appellant father was the minor’s primary caregiver for three years. The record established that the minor loved the appellant, wanted their relationship to continue and obtained some benefit from his visits. (*In re S.B.*, *supra*, 164 Cal.App.4th at pp. 298, 300-301.) Moreover, when the minor was removed from his care, the appellant “immediately recognized that his drug use was untenable, started services, maintained his sobriety, sought medical and psychological services, and maintained consistent and regular visitation with [the minor]. He complied with ‘every aspect’ of his case plan.” (*Id.* at p. 298.)

*In re S.B.* is distinguishable from the instant case. Father has never been Amaya’s primary caretaker. Mother received sole physical and legal custody of her in 2005 after the first dependency was vacated and dismissed. Father has been incarcerated for a significant portion of Amaya’s life. After Amaya was placed in foster care in May 2007, she had twice monthly supervised visits with Father and the visits went well. Occasionally the visits would be cut short and Amaya would be dropped off much earlier than was previously arranged. In early March 2008, Father was authorized to have overnight visitations with Amaya lasting up to three days. In early April, the Bureau

social worker told him overnight visits were authorized but he would need to be participating in services and have his home inspected. Father was instructed to arrange a home visit with the social worker for a home inspection. Father did not call to schedule a home visit until early June and the inspection occurred in late June at his request. As of July 7, Father had just begun reunification services and had not had any overnight visits approved. As of mid-August, Father had attended only four individual therapy sessions and three of 20 parenting education classes. Amaya's therapist stated that Amaya had a stronger connection with Mother than with Father. The therapist opined that Amaya's need for permanency and stability outweighed waiting for Father to "get it together." Father had only one supervised visit with Amaya since the last court hearing. Father's last visit with Amaya was on October 13. In December, Amaya told her caregiver that she does not want to visit with her paternal grandparents. Although Father missed two of four scheduled phone contacts with Amaya in January 2009, Amaya expressed no concern and did not ask to call him. Finally, Amaya refers to her foster parents as "Mom" and "Dad."

The record before us does not establish that the relationship between Father and Amaya promotes Amaya's well-being to such a degree that it outweighs the permanency and stability she would gain in a permanent home with adoptive parents. (See *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Moreover, the record does not establish that the relationship between Amaya and Father is such that she would suffer detriment from its termination. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467.)

DISPOSITION

The order is affirmed.

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Simons, Acting P. J.

We concur:

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Needham, J.

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Bruiniers, J.